

STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

PROVIDENCE, SC.

SUPERIOR COURT

[Filed: February 12, 2016]

STATE OF RHODE ISLAND

:

VS.

:

C.A. No. PC 97-3058

:

BROWN & WILLIAMSON TOBACCO :  
CORPORATION, ET AL. :

DECISION

SILVERSTEIN, J. This cause is before the Court for final decision with respect to matters involving certain arbitration provisions dealing with the so-called annual NPM (non-participating manufacturers) adjustment provided for in the Master Settlement Agreement of 1998 which terminated litigation among tobacco manufacturers and the various states and territories of the United States.

On January 7, 2016, this Court rendered a Bench Decision, so-called, in this matter which is incorporated herein and made a part hereof. A copy of which is annexed hereto.

Subsequent to that Decision the Court, in accordance with the provisions thereof, received reports on or about January 21, 2016 consistent with reports rendered to the Honorable Dee Benson, Judge of the United States District Court for the District of Utah, Central Division. The Court also received a request for an additional thirty day period to determine if an agreement could be “worked out” from the Attorney General representing the State of Rhode Island. Additionally, the Court has been furnished with copies of orders entered by several other courts with respect to the same or similar issues pending before those courts. The Court also has been furnished with (1) a copy of a transcript of a conference conducted by Judge Benson in the

United States District Court in Utah and (2) the transcript of a preliminary conference held on February 3, 2016 before Judges Robertson, Birch and Pro.

Based upon the foregoing (including its earlier Bench Decision), as well as on the arguments, written and oral before this Court, the Court rules as follows:

1. Pursuant to Section 5 of the Federal Arbitration Act, 9 U.S.C. § 5, former Article III judge, the Honorable Benson Legg, is appointed as the arbitrator for the tobacco manufacturer/seller side, i.e., for Philip Morris USA, Inc., R.J. Reynolds Tobacco Co. and the subsequent participating manufacturers collectively.
2. Judge Legg's appointment is in replacement of Judge Birch, previously designated by Philip Morris USA, Inc. as the arbitrator for the tobacco/seller side, and he will join Judges Robertson and Pro, heretofore selected as the State's arbitrator and the third-party arbitrator or umpire respectively.
3. The arbitration panel composed as herein indicated shall have sole discretion to decide what claims or issues shall be heard or resolved during and as part of the arbitration of the 2004 MSA payment adjustments.
4. In the event that all parties agree to an alternative course of action, they may seek relief from the Order to be entered herein by application to the Court.

Counsel for the parties shall submit the appropriate order consistent with this Decision for entry.



**RHODE ISLAND SUPERIOR COURT**

*Decision Addendum Sheet*

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**TITLE OF CASE:** State of Rhode Island v. Brown & Williamson Tobacco Corporation, et al.

**CASE NO:** PC 97-3058

**COURT:** Providence County Superior Court

**DATE DECISION FILED:** February 12, 2016

**JUSTICE/MAGISTRATE:** Silverstein, J.

**ATTORNEYS:**

For Plaintiff: Maria Corvese, Esq.; Rebecca J. Partington, Esq.

For Defendant: **\*SEE ATTACHED LIST**

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BENCH DECISION

SILVERSTEIN, J. This cause is before the Court for decision with

respect to a number of filings by various parties; to wit

- (a) R.J. Reynolds Tobacco Company's motion to enforce the arbitration provisions of the Master Settlement Agreement and compel arbitration;
- (b) Philip Morris USA, Inc.'s motion to confirm appointment of arbitrators pursuant to Section 5 of the Federal Arbitration Act;
- (c) State of Rhode Island's cross-motion to enforce the Master Settlement Agreement and compel arbitration;
- (d) Certain subsequent participating manufacturers' objections to (b) and (c) above and reply to (c) above; and
- (e) Various additional filings by way of memoranda, objections, etc.

The controversy among the various parties before the Court evolves out of the 1998 Master Settlement Agreement (MSA) which

terminated certain litigation among tobacco manufacturers and the various states and territories of the United States.

Pursuant to the terms of the MSA, the participating tobacco manufacturers make annual payments nationwide predicated upon the magnitude of their cigarette sales. Those payments are made to the fifty-two states and territories (the MSA states). Payment amounts are determined by an independent auditor and *inter alia* are subject to a so-called annual NPM adjustment. This adjustment was provided for in the MSA to adjust for a competitive disadvantage which might be imposed on the participating manufacturers by reason of lost market share due to competitive disadvantage in favor of non-participating manufacturers (NPMs).

The MSA provides a mechanism for resolution of disputes with respect to aspects of the NPM adjustment via arbitration pursuant to the provisions of the Federal Arbitration Act.

At issue apparently at the present time is (1) the scope of arbitration with respect to the year 2004 NPM adjustment and (2) has the arbitration clause contained in the MSA been implemented thus far by

reason of a Panel Formation Agreement signed by Philip Morris USA, the State of Rhode Island, as well as a number of other states. Not only has the Panel Formation Agreement been signed as aforesaid, the signatories have selected arbitrators in accordance therewith—Philip Morris —(without the direct involvement of RJ Reynolds) selected a retired federal article III judge as the neutral arbitrator picked by the participating manufacturers and the involved states picked another retired article III federal judge as neutral arbitrator. It appears that the two neutral arbitrators, so-called, selected as aforesaid are attempting to select another retired federal article III judge as the third arbitrator (Umpire) to complete the arbitration panel. The filings by R.J. Reynolds and other filings call into question the process which resulted in the formation of the Panel Formation Agreement and the selection by Philip Morris of the participating manufacturers' arbitrator (neutral) selected by it and also call into question the scope of the arbitration proceeding and how that issue is to be determined.

Addressing those issues, the Court first turns to (1) the scope of the 2004 NPM adjustment—despite the reams of paper dedicated to what

the arbitrators would hear and what would be excluded from them, this Court found it appropriate at the hearing before it on December 15, 2015 to muse as follows:

“The Court is a little bit perplexed at the amount of time that we have spent, both in briefing and in the arguments today, dealing with the issue [the scope of the 2004 Arbitration Adjustment] other than the issue as to whether or not that the selection of the judge is appropriate and whether or not the arbitration process has started. Because it seems to the Court, and I will have to go back and review my notes and look at the transcript of this and the notes that I had made on the papers that were filed, that at this juncture you are all in agreement.” (Tr. 81:24 – 82:8).

There really can be no disagreement. Essentially, the arguments presented to the Court with respect to the scope issue clearly disclosed that the parties are in agreement. Predicated upon that finding, to wit, that the parties in fact are in agreement, the dispute as to the 2004 NPM adjustment is for the arbitrators to determine, said arbitrators to be vested with discretion to determine what issues need be taken up by them in order for them to fully resolve that entire dispute. At an appropriate time an order to that effect will be entered.

With respect to the second issue, that is, the effect of the Panel Selection Agreement, the side letter and the selection by Philip Morris of Judge Birch, this Court recognizes that it has no obligation to adhere to the decisions or suggestions of any other jurisdiction dealing with these matters; however, and without necessarily adopting the reasoning or what appears to be preliminary conclusions of the Honorable Dee Benson in the United States District Court for the District of Utah, Central Division, in that certain matter captioned The State of Utah, et al. v. R.J. Reynolds Tobacco Company, et al., docketed as Case No. 2096-CV-829DB in that Court, I believe that now the parties should be able to work things out as to those issues and to work them out by January 21, 2016. Accordingly, as did Judge Dee Benson, I am directing you, the parties, to notify me when you notify Judge Benson on or about January 21, 2016 (see transcript of December 21, 2015 motion hearing in the United States District Court for the District of Utah as referred to above, page 106, line 18-20 and page 109, line 21-24).

Finally, this Court recognizes that the procedures which will eventually lead to the 2004 NPM Adjustment Arbitration have led to the

litigation pending before this Court as well as many other Courts around the nation. All of that litigation deals with the same issues pending before this Court. As to that litigation, different Courts have reached differing results. In some way, the Court expects that these differing results will be reconciled.

This Court wonders if there might be a better method for resolving these kinds of issues in a less expensive and less time-consuming manner.